BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GEORGIA A. ISHMAN	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 198,342 & 204,554
STATE OF KANSAS	)	
Respondent	)	
AND	)	
	)	
STATE SELF INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Claimant appeals from an Award entered by Administrative Law Judge Bryce D. Benedict dated November 21, 1997. The Appeals Board heard oral argument on May 19, 1998.

APPEARANCES

John J. Bryan of Topeka, Kansas, appeared for claimant. Marcia L. Yates of Topeka, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant permanent partial disability compensation based upon a 22 percent functional impairment. The Award does not separate the two accidents, but it appears all of the benefits awarded were for the accident that occurred on July 6, 1994, which is Docket No. 198,342. No benefits were awarded in Docket No. 204,554 for the accident that occurred on September 18, 1994. Although benefits were not specifically denied in Docket No. 204,554, the Award attributes all of claimant's permanent impairment to the July 6, 1994 accident. Also, the benefits are

calculated from that accident date and all of the temporary total disability compensation paid claimant are lumped together in one award for both accidents.

Claimant contends she is entitled to a separate award of temporary total disability compensation benefits in Docket No. 204,554. In Docket No. 198,342 claimant argues for a higher impairment of function. Claimant further contends that she is entitled to a work disability in excess of her percentage of functional impairment in Docket No. 198,342. Respondent argues for a reduction in the permanent partial disability award based upon a smaller percentage of functional impairment than that found by the Administrative Law Judge. Respondent further contends the Administrative Law Judge erred in failing to consider the deposition testimony of Dr. Joseph G. Sankoorikal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Appeals Board will first address the issue concerning the record. The Award contains an itemization of the record. Included in that itemization is the deposition of Joseph Sankoorikal, M.D., taken October 21, 1997. Nevertheless, the Award goes on to explain that "[d]espite requests from the Court the Respondent has not provided a copy of Dr. Sankoorikal's signed or unsigned deposition. The Court is operating under directions to issue awards within thirty days of submission and cannot wait for this deposition."

The Brief of the Respondent and Insurance Carrier describes the issue as follows:

> The Respondent submits that the Administrative Law Judge erred as a matter of law in deciding the case without fully considering the deposition testimony of Dr. Joseph G. Sankoorikal. The Deposition of Dr. Sankoorikal, which was taken within the Respondent's terminal date, but filed by the Court Reporter after the terminal date had passed, was not included in the record and therefore [was not] fully considered by the Administrative Law Judge.
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> The terminal dates of the parties were set by the Administrative Law Judge at the Regular Hearing which was held on October 9, 1997. The Administrative Law Judge was advised by counsel that the deposition of Dr. Sankoorikal was scheduled for October 21, 1997. Knowing this, the Administrative Law Judge set the Respondent's terminal date for October 22, 1997. Dr. Sankoorikal's deposition was taken on the 21st and the transcript of the same was filed by the Court Reporter on November 22, 1997, one day after the Administrative Law Judge entered his award. The delay in filing the deposition transcript with the Division was the result of the Court Reporters *[sic]* forwarding of the transcript to the witness for his review and signature as allowed by statute.
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> The Administrative Law Judge erred by entering the Award without the benefit of the whole record. K.S.A. 44-523 provides that the parties shall be

> given "reasonable opportunity to be heard and *[sic]* present evidence." Further, K.S.A. 44-501(a) requires the Administrative Law Judge to consider the whole record in deciding matters under the act.
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> Respondent submits that the deposition testimony of Dr. Sankoorikal, taken before the terminal date expired, should have been deemed timely submitted and therefore considered in its entirety by the Administrative Law Judge. In this case, it was the Administrative Law Judge who set the applicable terminal date, knowing in advance that the deposition of Dr. Sankoorikal was set for October 21, 1997. The Respondent had no control over when the deposition transcript would be reviewed and signed by the witness and filed with the Division. As such, the Administrative Law Judge erred by failing to fully consider the medical testimony of Dr. Sankoorikal in rendering his decision.

Although the Administrative Law Judge points out in his Award that the transcript of the deposition of Dr. Sankoorikal was not available to the Court when the case was decided, it is apparent that certain aspects of Dr. Sankoorikal's testimony were considered. The Administrative Law Judge attempted to glean from the preliminary hearing exhibits and the respondent's submission letter the crux of Dr. Sankoorikal's testimony. These pieces of inadmissable "evidence" were obviously factored into the award, including the percentage of permanent impairment, which was based upon an average of the functional impairment ratings given by Dr. Sankoorikal and Dr. Daniel D. Zimmerman.

Claimant and respondent agree the deposition of Dr. Sankoorikal was part of the record and should have been considered by the Administrative Law Judge. In Claimant's Reply Brief to the Board, she states:

> The aim of the workers' compensation proceeding is or should be to arrive at a fair result giving all parties a complete opportunity to be heard. A speedy decision is not the intended end result. A fair and just result with impartial application of the work comp statutes is or should be the primary intended end result. . . .
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> Respondent may well be entitled to have the case remanded for determination based upon all the evidence, however, the Appeals Board decides the case on a *de novo basis* and perhaps respondent to avoid the delay and expense of remand and reappeal will agree to have the Board determine the issues without remand.

During oral argument to the Board, the parties agreed that the Board should determine the issue of nature and extent of claimant's disability without first remanding the case to the Administrative Law Judge for a determination of the issues based upon his

review of the entire record. The Appeals Board agrees this is the preferred approach. It better utilizes limited administrative court resources and saves time.

With regard to the timing of the Administrative Law Judge's Award, the Appeals Board understands the pressures involved to expedite decisions. Nevertheless, some exceptions to a rigid adherence to a 30-day rule must be made in circumstances such as this where a deposition transcript could not be transcribed, forwarded to the witness for his review and signature, returned, and filed with the Division within 30 days of the testimony being taken. Even claimant suggests it may have been unrealistic to set the terminal date for all evidence to be submitted less than 30 days after the regular hearing and only one day after the scheduled deposition. In this case, the transcript of Dr. Sankoorikal's deposition was taken on October 21, 1997, and was filed on or about November 22, 1997. The certified shorthand reporter's certificate states the original deposition was filed with the Division of Workers Compensation on November 22, 1997. Although the reporter's Notice of Filing is stamped received on November 24, 1997, the deposition transcript itself is not filed stamped.

The taking of testimony by deposition is as much a convenience to the court as it is to the parties and the witnesses. A reasonable time must be afforded to the reporter for transcribing the testimony and to the witness for reviewing, correcting, and signing the transcript. The alternative is to take all testimony in person before the administrative law judge. This is really not a realistic option given the limited number of administrative law judges within the Division of Workers Compensation.

The testimony of Dr. Sankoorikal is part of the record in both docketed claims and the Appeals Board has considered it in this review.

Docket No. 198,342

On July 6, 1994, claimant was going down some stairs when they crumbled and she fell eight or nine steps to a concrete floor.

Claimant started working for the respondent, Topeka Correctional Facility, in 1989. At the time of her injury she was a corrections supervisor. Her job duties included restraining combative inmates and responding to alarms. As supervisor, she was to be the first to respond to alarms and had to run to respond in time. She supervised about 400 inmates in five buildings. Her job duties also took her to the Reception and Diagnostic Center which is on three floors with no elevator. She also had to inspect towers daily. The three towers were also three stories tall with no elevators.

Claimant voluntarily quit her job with respondent to take a job at KANZA as a correctional alcohol and drug counselor. She worked in that capacity from August 1995

until January 1997. She quit that position because she was not able to tolerate the travel and stair climbing. She was off work until July 1997 when she took a part-time job as a security guard at a Penney's store in Overland Park. That job paid $6.20 per hour and she worked 20 hours per week. She eventually quit that job on September 20, 1997 because she was missing a lot of work due to illness. She has not looked for work since and has applied for social security disability.

Claimant's average weekly wage on the date of accident was $587.14, or $30,531.28 per year. Ninety percent of that annual wage is $27,478.15. Claimant's job at KANZA paid $24,000 per year which is less than 90 percent of her average weekly wage. Accordingly, claimant's income does not bar a work disability. During the time she worked for KANZA, claimant had a 21 percent wage loss. Claimant also seeks a 74 percent wage loss during the approximately 10-week period she was employed by J. C. Penney from July 1997 until September 20, 1997. For the period of unemployment between January 1997 through June 1997 and for all of the time following her termination from J. C. Penney, claimant claims a 100 percent wage loss. A 72 percent task loss is claimed throughout. Respondent argues for a 29 percent task loss based upon the testimony of Dr. Sankoorikal and using the revised task list compiled by the Administrative Law Judge. Claimant also accepts the Administrative Law Judge's task analysis. The Administrative Law Judge found a 72 percent task loss based upon the testimony of Dr. Sharon L. McKinney and Dr. Zimmerman. By factoring in the opinion of Dr. Sankoorikal, the Appeals Board finds the task loss should be 58 percent.

Although the Administrative Law Judge made findings concerning claimant's loss of task performing ability, claimant was denied a work disability award finding as follows:

> The first question is whether the Claimant's injuries rendered her unable to perform her regular job duties. The Court has no doubt that the Claimant sincerely felt that her physical condition made it impossible to continue her employment as a corrections officer. Whether the objective evidence supports this is another matter. Given the restrictions of Dr. Sankoorikal, and the Claimant's ability to retain employment at KANZA, the Court finds that the Claimant has failed to meet her burden on this issue.
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> Further, the actions of the Claimant denied the Respondent an opportunity to provide an accommodated position. It is only speculation as to whether the Respondent could have provided such accommodation. Neither party presented evidence on this point, however, the Claimant has the burden of proof. For this reason also a work disability should be denied.

The dispute in this case concerns the application of the work disability standards set forth in K.S.A. 1994 Supp. 44-510e. Each party phrases the issue somewhat differently. The differences in their descriptions of the issue, in effect, state their argument. Respondent states that the issue is whether a claimant should be entitled to work disability

if she quit accommodated employment without requesting further accommodation and without medical direction. Claimant, on the other hand, states that the issue is whether claimant's job change was reasonable and done in good faith and whether respondent has ever made a reasonable offer of accommodation.

The statutory language at issue is the language found in K.S.A. 1994 Supp. 44-510e which states:

> An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

In Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), the Court of Appeals construed similar language found in this same statute prior to the 1993 amendments. At that time the statute provided for a presumption of no work disability when the claimant engaged in work at a comparable wage. The Court there held that a claimant who refuses to even attempt offered employment within the work restrictions should be treated the same as an employee who engages in work at a comparable wage. That claimant was limited to an award based upon functional impairment.

In Guerrero v. Dold Foods, Inc., 22 Kan. App. 2d 53, 913 P.2d 612 (1995), the Court of Appeals clarified the principle stated in Foulk. In that case the Court of Appeals rejected an argument that claimant should be limited to functional impairment where the claimant attempted the work and was terminated when she advised her employer the work was causing her problems. The facts mentioned in the Guerrero decision include expert medical opinion indicating the work was not appropriate for claimant's injury. The Court of Appeals distinguishes Foulk, however, primarily on the basis that the claimant in Guerrero did not refuse to attempt the accommodated employment.

On the basis of these decisions, the Appeals Board concluded that the fiction, treating claimant as engaging in work at 90 percent of the preinjury wage, is not to be applied except where claimant's conduct is equivalent to refusing to attempt accommodated employment. Also, the Board considered the conduct equivalent in those cases where the claimant accepted the offer but did not make a good faith effort to perform accommodated employment. *See, e.g.,* Banuelos v. Excel Corporation, Docket No. 180,288 (May 1996).

When this standard is applied to the facts of this case, the Appeals Board concludes that the evidence does not establish claimant failed to make a good faith effort at the accommodated employment or engaged in conduct which should be treated as equivalent to refusing to attempt the employment. The reasonableness of respondent's

accommodation and claimant's reasons for leaving the employment are both factors relevant to this determination.

Most of the material facts are not in dispute. After the injury in July 1994, except for periods of temporary total disability, claimant continued to work for respondent until August 17, 1995. At that time claimant was under temporary restrictions from Dr. Sankoorikal. It is not clear from the record how respondent was accommodating those restrictions, but it is clear that claimant could not perform all of her regular job duties and, in particular, could not restrain prisoners. Walking and stair climbing were also a problem for her. Claimant testified that her supervisor told her they had no light-duty work. But claimant conceded there were other employees that had been given light-duty jobs because of permanent medical restrictions.

As indicated, claimant contends her job change was reasonable. The Appeals Board agrees. The evidence establishes that claimant worked in an environment with an ongoing potential for a sudden emergency need to violate her restrictions to restrain a prisoner, or a situation could arise where she would need to protect herself or a coworker. As claimant's counsel points out, the accommodations claimant was given did not give claimant a clear method to avoid violating the restrictions.

Nevertheless, a claimant who is performing accommodated work should advise the employer of problems working within the restrictions and afford the employer the opportunity to adjust or at least to decide whether it wants to adjust the accommodation. The failure on the part of the employee to do so would in many cases be strong evidence that claimant is not making a good faith effort.

In this case, however, the totality of the circumstances does not, in our opinion, warrant a conclusion that the claimant's conduct was the equivalent of refusing to attempt to perform accommodated employment. First, as indicated, the accommodations did not provide any specific method for claimant to avoid violating her restrictions in performing her duties for respondent. Under these circumstances claimant could quite reasonably conclude that she would not be able to perform the job duties within the medically recommended restrictions. Second, the restrictions of the treating physician, Dr. Sankoorikal, as well as the subsequent restrictions by Dr. McKinney and Dr. Zimmerman, suggest that it would have been very difficult for respondent to have accommodated those restrictions. Dr. Sankoorikal modified his temporary restrictions in September 1995, but agreed that claimant's job change was reasonable and he would not recommend claimant go back to doing the job she was doing when she was injured. These factors lead the Appeals Board to conclude that claimant's conduct was not tantamount to refusing to accept accommodated work and, therefore, not subject to the rules announced in Foulk.

After Foulk, the Court of Appeals added a requirement that the fact finder determine whether a claimant has made a good faith effort to find work. Pursuant to Copeland v.

Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997), if the claimant has not made a good faith effort to find suitable employment, a post-injury wage is imputed to claimant based upon the relevant factors. The Appeals Board finds claimant made a good faith effort to find appropriate work up until the time she left her employment with KANZA. Thereafter, she did not. Therefore, a wage should be imputed based upon claimant's ability for the period of time beginning with the date claimant left her employment with KANZA on February 1, 1997. Claimant's salary at KANZA constitutes the best evidence of claimant's post-accident wage earning ability. Therefore, a wage of $24,000 per year, or $461.54 per week, will be imputed to claimant. This represents a wage loss of 21 percent.

For the period beginning with the date of accident through date claimant left her employment with respondent, claimant is entitled to functional impairment only. The Appeals Board affirms the Administrative Law Judge's finding of a 22 percent impairment of function.

Claimant makes an argument that under the new Act the permanent partial disability compensation should commence immediately upon the date of accident and should not commence following the number of weeks that temporary total disability compensation was awarded. The Appeals Board disagrees and will continue with the longstanding practice of commencing permanent partial disability compensation after the temporary total disability compensation weeks are paid for purposes of computing the award.

Docket No. 204,554

The parties are in agreement that the accident on September 18, 1994, caused a temporary injury only. Therefore, no permanent partial disability award is warranted. Claimant alleges that at the regular hearing the parties stipulated that 6.86 weeks of temporary total disability compensation was paid for the July 6, 1994 accident, which is Docket No. 198,342, and that respondent paid 3 weeks of temporary total disability for the September 18, 1994 accident at the rate of $319, or $957, for the period of July 18, 1995, through August 7, 1995. But the transcript of the October 9, 1997 regular hearing clearly shows that respondent paid all of the temporary total disability compensation under one claim number, that being Docket No. 198,342 or the accident of July 6, 1994. For the entire claim respondent paid 10.86 weeks of temporary total disability totaling $3,464.34 at the rate of $319 per week, which was the maximum weekly compensation rate for accidents that occurred between the dates of July 1, 1994, and June 30, 1995, inclusive.

Furthermore, claimant never mentioned a subsequent accident to the doctors. Therefore, the Appeals Board agrees with the Administrative Law Judge that these two docketed claims should be combined and treated as one accidental injury. The Board finds the September 18, 1994, incident caused a temporary flare-up in claimant's symptoms but all of the permanency, temporary total disability, and medical treatment expense is attributable to the July 6, 1994 accident.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Bryce D. Benedict dated November 21, 1997, should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Georgia A. Ishman, and against the respondent, State of Kansas, and its insurance carrier, State Self-Insurance Fund, for an accidental injury which occurred July 6, 1994, and based upon an average weekly wage of $587.14 for 10.86 weeks of temporary total disability compensation at the rate of $319 per week or $3,464.34, followed by 47.29 weeks for the period through August 17, 1995, at the rate of $319 per week or $15,085.51, for a 22% permanent partial disability, and 118.71 weeks for the period beginning August 18, 1995, at the rate of $319 per week or $37,868.49, for a 40% permanent partial disability, making a total award of $56,418.34, which is all currently due and owing and ordered paid in one lump sum minus amounts previously paid.

The Appeals Board approves and adopts all other orders in the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of June 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Topeka, KS
Marcia L. Yates, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director